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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BRIAN S. MURPHY,

Plaintiff and Respondent,

v.

DONNA M. DELL, as Labor
Commissioner,

Respondent;

SAME DAY AIR COURIERS OF
ILLINOIS, INC., et al.,

Appellants and Real Parties in
Interest.

D053735

(San Diego County
Super. Ct. No. GIE026457)

APPEAL from an order of the Superior Court of San Diego County, Eddie C.

Sturgeon, Judge. Affirmed.

Appellants and real parties in interest, Same Day Air Couriers of Illinois, Inc. and its affiliated corporations (the Employer) appeal from an order in favor of Plaintiff and

Respondent Brian Murphy (Murphy), in this action for a writ of mandate or administrative mandamus.¹ (Code Civ. Proc., §§ 1085, 1094.5.) In 2000, Murphy filed a claim for unpaid wages against Employer (the underlying claim) with Respondent, the California Division of Labor Standards Enforcement (the DLSE).² That underlying claim has never been adjudicated on the merits, although it has been the subject of several administrative and superior court proceedings.

On appeal, the Employer contends that the trial court should not have granted Murphy's petition and motion to set aside an order by the Labor Commissioner's (the Commissioner) hearing officer (an order of dismissal of his underlying claim, dated May 9, 2007). According to the Employer, when Murphy filed a 2004 superior court action, which was ultimately dismissed for lack of prosecution, he made a binding election of remedies, and his underlying claim is no longer subject to adjudication on the merits. Additionally, the Employer argues this petition was untimely filed.

We agree with Murphy that the trial court was justified in granting his petition, because the Commissioner abused its discretion in dismissing the underlying claim, in light of the statutory purposes of the Labor Code provisions for administrative resolution of employee complaints regarding unpaid wages. (Lab. Code, § 98 et seq.) Substantial

¹ In referring to the Employer, we also include the affiliated corporations who are appellants and respondents, Same Day Air Global Corp. and Same Day Air, Inc.

² "The DLSE 'is the state agency empowered to enforce California's labor laws, including IWC wage orders.' [Citations.]" (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581.) The Labor Commissioner (Commissioner) appeared as a party in superior court, but has not filed briefs on appeal despite being served. Through its hearing officer, the Commissioner issued the order being challenged on this appeal.

evidence supported the court's conclusion that Murphy was entitled to proceed to a hearing before the Commissioner. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

We will outline the bare bones of the long and complicated factual and procedural history of this case, only as necessary to address the legal issues presented.

A. Employment, Termination and Administrative Proceedings

According to the allegations of the numerous verified pleadings in the case, Murphy worked for the Employer from 1996 until 2000, selling rush delivery and transport services. He set up numerous lucrative accounts. His employment agreement included provisions for a draw, which was to be taken against future commissions for sales, as well as stock and other compensation.

In May 2000, Employer terminated Murphy's employment. Murphy claimed he was still owed a large amount of money in unpaid wages. He filed the underlying claim for unpaid wages, interest and penalties with the Respondent Commissioner's office in November 2000.

For over three years, a number of administrative proceedings were pursued, because Murphy had difficulty serving the Employer and was claiming that it and its affiliated corporations were evading service. Ultimately, the Commissioner issued what was essentially a default award to Murphy on December 26, 2003, nunc pro tunc to April 11, 2002, for unpaid wages, interest and waiting time penalties of over \$600,000.

Next, in January 2004, the Employer sought relief from the default award, due to an alleged lack of notice. (Lab. Code, § 98, subd. (f).) In December 2004, Deputy Labor

Commissioner Johanna Hsu granted that application to set aside the default award, on the basis that a resolution on the merits should be pursued where possible.

B. Superior Court Proceedings, Phase I: Commissioner's Dismissal

Meanwhile, in May 2004, Murphy filed a superior court complaint in San Diego seeking relief for breach of employment contract. He claimed that the delay in the DLSE proceedings caused him to seek alternative relief, and that he feared the limitations period would run on his civil claims if he did not file.

That court case was transferred to Los Angeles and pretrial proceedings were held. According to Murphy's verified petition, the parties had agreed in that matter to bifurcate a limitations defense from the merits, with the knowledge of the trial court, but when the matter came to trial, the court did not adhere to the agreement that it supposedly had approved. To the alleged surprise of Murphy, in July 2005, the trial court then dismissed the court case for lack of prosecution. Judgment was entered in September 2005, and that dismissal was upheld on appeal.

C. Superior Court, Phase II: Original Petition and Demurrer

In April 2005, Murphy filed the original petition in this case, to obtain review of a nonjudicial act, i.e., seeking to set aside the December 2004 order by the deputy Commissioner that had vacated the default award. (Code Civ. Proc., §§ 1085, 1094.5.)³

³ The Employer recently filed an unopposed motion to augment the record on appeal with a copy of the original petition filed in 2005 in this case number, and a copy of its demurrer to the petition. We grant this request. (Cal. Rules of Court, rule 8.155.) Previously, we augmented the record with other documents inadvertently omitted from the clerk's transcript, including the petition that is the subject of this appeal.

The Employer responded with a demurrer. That matter was heard in June of 2006, and the trial court (Judge Sturgeon) left the Commissioner's order in place, anticipating that an administrative hearing on the merits would be conducted. The court told the parties on the record that if no administrative hearing were afforded, the court would entertain a renewed petition on the same issues, thus essentially deferring a decision.

Apparently, the clerk filed an erroneous dismissal form. However, Murphy obtained relief from the court to allow the case to be reactivated, since the demurrer had essentially been sustained with leave to amend.

After the demurrer hearing, the Employer filed an administrative request that the Commissioner dismiss the underlying claim, on the basis that Murphy's filing of the complaint that had been heard in Los Angeles (and dismissed in Sept. 2005) had irrevocably elected a court remedy. The Employer relied on a 1995 opinion letter by chief counsel for the DLSE, stating that the Commissioner's office has policies that it will not entertain claims which are already before the courts, and it will dismiss a claim before it, if a related court action is filed. The Commissioner's hearing officer, Victor Rojas, granted the motion to dismiss the underlying claim on May 9, 2007, due to the existence of the order and judgment of dismissal in the civil action.

D. Superior Court Proceedings: Phase III

The order on appeal stems from Murphy's renewed petition that was filed in April 2008 to challenge the Commissioner's order of May 9, 2007 (dismissing the underlying claim). At the same time, Murphy filed a companion petition that again sought to overturn the December 2004 order that the matter should be heard on the merits in the

administrative forum. Opposition was filed by both the Employer and the Commissioner. The Commissioner took the position that it currently lacked jurisdiction to proceed with a hearing, unless the court ordered it to do so.

After hearing argument from all three counsel on both motions in May 2008, the trial court (Judge Sturgeon) issued a ruling that granted the petition to vacate the Commissioner's May 9, 2007 decision that had dismissed the Labor Code claim. The Commissioner was ordered to set a hearing on the merits. The court ruled in the companion matter that it would not annul the December 2004 order that vacated the default judgment.

The Employer appeals the decision. The Commissioner has not filed any briefs on appeal, apparently taking no position on the matter.

DISCUSSION

We first observe that Murphy is no longer seeking to revive the 2003 default award, since that part of the trial court's current decision is not challenged on appeal. Instead, the issue before us is whether the trial court accurately assessed the legal effect of the many and various convoluted administrative and court rulings that have taken place in this case, for purposes of deciding whether (1) the petition was timely, and (2) the Commissioner's most recent dismissal order should be vacated, so that the underlying claim may proceed to a hearing on the merits. We first set forth our standards of review and then apply them to this record.

I

STANDARDS OF REVIEW

The subject petition pled both ordinary and administrative mandamus allegations. In any case, " 'mandamus pursuant to section 1094.5, commonly denominated "administrative" mandamus, is mandamus still. ... The full panoply of rules applicable to "ordinary" mandamus applies to "administrative" mandamus proceedings, except where modified by statute.' " (8 Witkin, Cal. Procedure (5th ed. 2008) Extraordinary Writs, § 263, pp. 1171-1172.) The basic requirements for mandamus to issue in the trial court include showings of: "(a) a clear, present, (and usually ministerial) duty on the part of the respondent; (b) a clear, present, and beneficial right in the petitioner, to the performance of that duty. In the absence of a showing of this correlative duty and right, the writ will be denied. [Citations.]" (8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 74, p. 954.)

Administrative adjudications that are quasi-judicial in nature are reviewable through administrative mandamus under Code of Civil Procedure section 1094.5, "subject to the statutes governing the particular agency. [Citation.]" (9 Witkin, Cal. Procedure, *supra*, Administrative Proceedings, § 148, p. 1281.) Alternatively, for review of decisions by an agency that does not have judicial power, but must make factual determinations, "courts exercise independent judgment and weigh the evidence, if the proceeding substantially deprives a party of a fundamental vested right. [Citations.]" (*Ibid.*)

Both parties rely on *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817, 824 (*Fukuda*) as setting forth the appropriate standards for the trial court to apply and for our review on appeal. When the superior court reviews the evidence presented before an administrative agency by using an independent judgment test, the court determines whether the agency abused its discretion, such as where the findings are not supported by the weight of the evidence. (*Id.* at pp. 816-817.) We think that because this case involved a fundamental right to due process, in the nature of protecting a right to a day in court for resolution on the merits of the underlying claim, it was appropriate for the trial court to use its independent judgment to evaluate the course of events since the 2000 filing of the claim. The Commissioner had issued a quasi-judicial ruling that dismissed the underlying claim.

The trial court properly analyzed that ruling by determining "whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) Although mandamus will not be issued for the purpose of controlling an exercise of discretion by an administrative agency, "mandamus will lie to correct an 'abuse of discretion' by an [administrative] officer or board. [Citations.]" (8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 95, p. 990.) On appeal from the decision of the trial court, the court's findings will be sustained if they are supported by substantial evidence. (*Fukuda, supra*, 20 Cal.4th at p. 824.)

Likewise, to the extent Murphy was pleading entitlement to relief in ordinary mandamus (Code Civ. Proc., § 1085), "the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.] However, the appellate court may make its own determination when the case involves resolution of questions of law where the facts are undisputed. [Citation.]" (*Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700.)

Here, the relevant facts are essentially undisputed, and we evaluate the procedural issues presented de novo, while also giving deference to the underlying factual findings by the trial court. (See *Pasadena Unified School Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314; *Kolender v. San Diego County Civil Service Commission (Gant)* (2007) 149 Cal.App.4th 464, 471 [" ' "The appellate court must determine whether the administrative agency exercised its discretion to an end or purpose not justified by all the facts and circumstances being considered." [Citations.]' ").] "Moreover, 'The agency's discretion is not unfettered, and reversal is warranted when the administrative agency abuses its discretion, or exceeds the bounds of reason.' [Citation.]" (*Gant, supra*, at p. 471.)

II

ANALYSIS

The Employer argues two points to challenge the order. First, it complains that the April 2008 filing of this renewed petition was not timely as to the Commissioner's 2007 order dismissing the administrative proceedings. However, there is no hard and fast rule that a petition for a writ of mandate must be filed within the same 60-day period as is

applicable to an appeal. (*Volkswagen of America, Inc. v. Superior Court* (2001) 94 Cal.App.4th 695, 701.) Rather, " 'An appellate court may consider a petition for an extraordinary writ at any time [citation], but has discretion to deny a petition filed after the 60-day period applicable to appeals, and should do so absent "extraordinary circumstances" justifying the delay.' [Citation.]" (*Ibid.*) Due to the unique circumstances of this case, amounting to a comedy of errors, delay, and misunderstandings equally attributable to both parties, the better exercise of our discretion is to deem this petition timely filed in the trial court, for challenge of the administrative order in question. (*Id.* at p. 701, fn. 6.)

On the merits, the Employer contends that when Murphy filed his 2004 superior court action (ultimately dismissed for lack of prosecution), he made a binding election of remedies, and his underlying claim may no longer be adjudicated on the merits. The rationale for the doctrine of election of remedies is that a person should not be entitled to claim two inconsistent rights, "but a person would be free to select and change his or her alternative remedies or legal theories of recovery, by amending the complaint or by filing a new action, until such time as one of the inconsistent rights was finally vindicated by the satisfaction of a judgment or by the application of the doctrine of res judicata or estoppel. [Citations.]" (3 Witkin, Cal. Procedure, *supra*, Actions, § 180, p. 260, citing, e.g. *Frazier v. Metropolitan Life Ins. Co.* (1985) 169 Cal.App.3d 90, 101.)

The Employer relies on cases such as *Cuadra v. Millan* (1998) 17 Cal.4th 855, 858 (*Cuadra*) (disapproved on another ground in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4), as representing the rule that an employee who seeks to pursue a wage-related claim

" ' "has two principal options. The employee may seek judicial relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. [Citations.] Or the employee may seek administrative relief by filing a wage claim with the commissioner pursuant to a special statutory scheme codified in sections 98 to 98.8." ' [Citations.]" (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1115 (*Murphy*), citing *Cuadra, supra*, 17 Cal.4th 855, 858.)

"The Labor Commissioner 'has broad authority to investigate employee complaints and to conduct hearings in actions "to recover wages, penalties, and other demands for compensation. . . ." [Citation.]" [Citation.]" (*Murphy, supra*, 40 Cal.4th 1094, 1115.) In *Cuadra, supra*, 17 Cal.4th 855, 865-871, mandamus relief was properly issued to overturn an administrative policy of the Commissioner to calculate back pay in a certain manner, which was deemed unlawful under Labor Code section 98. (See 8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 95, p. 991.) The Supreme Court has acknowledged in such cases that the Commissioner has implied authority to regulate the proceedings before it, such as determining the timeliness of claims. (*Cuadra, supra*, 17 Cal.4th 855, 866-867.) Also, beyond the powers expressly given to the Commissioner's office, it " 'may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers.' [Citations.]" (*Ibid.*)

Here, the trial court (Judge Sturgeon) concluded that the dismissal of the administrative proceeding by the Commissioner was inconsistent with a proper exercise of its statutory duties under Labor Code section 98 et seq., to investigate employee

complaints and hold hearings in actions by employees to recover unpaid wages and compensation. The court was mindful that Murphy's superior court action in Los Angeles had been dismissed under circumstances which that judge had interpreted as an unexcused lack of prosecution (although Murphy's verified petition continues to dispute that). Under all the relevant circumstances, a dismissal of the underlying administrative claim would leave Murphy without a remedy. Supreme Court authority such as *Cuadra, supra*, 17 Cal.4th 855, 858, does not support a conclusion that such a resolution of a related court case, on procedural rather than merits grounds, will necessarily bar an ongoing administrative claim based on the same allegations, and the election of remedies theory is inapposite. (See 3 Witkin, Cal. Procedure, *supra*, Actions, § 180, p. 261.)

Under the unique circumstances of this case, we agree with the trial court that this particular resolution by the Los Angeles court of Murphy's action (dismissal for lack of prosecution) does not support an exercise of discretion by the Commissioner's office to dismiss the underlying claim as well. Moreover, the court made implied findings that Murphy had not somehow forfeited or waived the claim throughout the course of the proceedings. The court was extremely familiar with the proceedings to date, and consistently sought to ensure that an administrative hearing on the merits should be afforded. Thus, the trial court had an adequate basis in the evidence to view the Commissioner's dismissal order as an abuse of discretion, in light of the statutory purposes of the Labor Code scheme for administrative resolution of employee complaints regarding unpaid wages. (Lab. Code, § 98 et seq.) Substantial evidence supported the

trial court's conclusion that Murphy was entitled to proceed to a hearing before the Commissioner.

DISPOSITION

The order is affirmed. Costs on appeal are awarded only to Respondent Murphy.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.